

1975

Constitutional Law - Abortion - Father's Rights

Judith Haskell Zernich

Follow this and additional works at: <https://dsc.duq.edu/dlr>



Part of the [Law Commons](#)

Recommended Citation

Judith H. Zernich, *Constitutional Law - Abortion - Father's Rights*, 13 Duq. L. Rev. 599 (1975).
Available at: <https://dsc.duq.edu/dlr/vol13/iss3/8>

This Recent Decision is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

Recent Decisions

CONSTITUTIONAL LAW—ABORTION—FATHER'S RIGHTS—The Supreme Court of Massachusetts has denied injunctive and declaratory relief to a father seeking to restrain the mother of his child from procuring an abortion.

Doe v. Doe, 314 N.E.2d 128 (Mass. 1974).

*Doe v. Doe*¹ is one of a number of recent cases to entertain and dismiss a father's request to prevent the mother of his child from procuring an abortion.² This case was a response to the United States Supreme Court's invitation to expand or delimit the elusive concept of right of privacy upon which the abortion decision of *Roe v. Wade*³ rests. The Supreme Judicial Court of Massachusetts re-

1. 314 N.E.2d 128 (Mass. 1974). See Mellinkoff, *Who Is "John Doe"?*, 12 U.C.L.A.L. Rev. 79 (1964) for a discussion of the history and purpose of the pseudonym "Doe."

2. *E.g.*, *Coe v. Gerstein*, 376 F. Supp. 695 (S.D. Fla. 1973), *cert. denied*, 417 U.S. 279 (1974); *Doe v. Rampton*, 366 F. Supp. 189 (D. Utah), *vacated and remanded*, 410 U.S. 950 (1973); *Coe v. General Hosp.*, Civil No. 1477-71 (D.D.C. June 5, 1972) (hospital's spousal consent requirement for both abortion and sterilization held to be unconstitutional); *Jones v. Smith*, 278 So. 2d 339 (Fla. Dist. Ct. App. 1973), *cert. denied*, 415 U.S. 958 (1974); *Pound v. Pound*, 42 U.S.L.W. 2456 (Ill. Cir. Ct. Jan. 31, 1974); *cf. Doe v. Bellin Memorial Hosp.*, 479 F.2d 756 (7th Cir. 1973) (putative father held not to be an indispensable party to a suit brought by a woman and her physician challenging a private hospital's regulations prohibiting abortion). *Contra*, *Planned Parenthood v. Danforth*, Civil No. 74-416C(A) (E.D. Mo. Jan. 1975) (state spousal consent statute upheld as furthering the state's compelling interest in the "integrity of the marriage unit and the mutuality of decisions made by the partners to that unit").

The petitioner in *Doe* requested injunctive and declaratory relief against both his wife and her licensed attending physician. MASS. GEN. LAWS ANN. ch. 272, § 19 (1970), imposed criminal penalties on anyone performing an abortion unless done to preserve the life or health of the mother. *Kudish v. Board of Registration in Medicine*, 356 Mass. 98, 99-100, 248 N.E.2d 264, 266 (1969). This statute was rendered unconstitutional by the decision of *Roe v. Wade*, 410 U.S. 113 (1973). *Women of the Commonwealth v. Quinn*, Civil No. 71-2420-W (D. Mass. Feb. 21, 1973). This left the interests of petitioner in *Doe* unprotected.

3. 410 U.S. 113 (1973). The Court stated:

[W]e [do not] discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No parental right has been asserted . . . We need not now decide whether [statutory provisions requiring the consent of the spouse] are constitutional.

Id. at 165 n.67.

4. At issue in *Roe* were the rights of an unmarried woman under a criminal abortion statute. The prospective father's consent to the abortion was assumed for purposes of the disposition of the case; in *Doe*, the estranged husband and prospective father objected to the abortion. Unlike *Roe*, the pregnancy in *Doe* was desired by both parties at the time of conception.

garded any potential right of the father as virtually foreclosed by the *Roe* decision: It did not question the appropriateness of the application of *Roe* to the facts before it,⁴ nor did the court explore other traditional and emerging concepts of the rights and duties of the father which might be inconsistent with its decision. While it is clear that rights of both the father and mother were at issue, the *Doe* court's opinion reflects the view that the delicate question of the father's rights was subordinate. The purpose of this note is to show how a more balanced and reasoned approach could have been taken.

The question presented to the court was whether the father has any rights in the abortion decision.⁵ The court's response was a qualified "no"—at least not before the fetus is viable.⁶ To hold otherwise would be inconsistent with *Roe v. Wade* and with recent case law which has shown little sympathy for the father's claim.⁷ The effect of acknowledging a right of the father would be twofold: The state could be summoned to protect this right, and a correlative duty would be imposed on the mother to carry the pregnancy to term.⁸ The issue thus arises whether, in balancing the interests of the mother and father, the father's interest is substantial enough to warrant state interference on his behalf through injunctive or declaratory relief.⁹

RIGHT OF PRIVACY

Aside from Justice Douglas' concurring opinion,¹⁰ the *Roe* Court's opinion adds little more to the definition of the judicially-created right of privacy than the specific holding that abortion is to be included in that right. The Court avoided a concrete definition of privacy and argued by analogy: Since the constitutional right of

5. Brief for Petitioner at 3, *Doe v. Doe*, 314 N.E.2d 128 (Mass. 1974). This question is essentially one of the husband's standing. By deciding the issue on the merits, the court evidently presumed the standing requirement was met.

6. 314 N.E.2d at 132.

7. See note 2 *supra*.

8. Jenkins, *The Concept of Rights and the Competence of Courts*, 18 AM. J. JURISPRUDENCE 1, 1-2 (1973).

9. See Comment, *Abortion and the Husband's Consent*, 13 J. FAMILY L. 311 & n.6 (1974) [hereinafter cited as FAMILY LAW COMMENT]. *Roe v. Wade*, 410 U.S. 113 (1973), recognized two compelling state interests—the protection of maternal life and the protection of potential human life—both qualifying the woman's right to an abortion. *Id.* at 154. The plaintiff in *Doe* was asserting rights independent of those the state might have.

10. *Doe v. Bolton*, 410 U.S. 179, 211-15 (1973) (Douglas, J., concurring).

privacy has been applied to activities relating to marriage, procreation, contraception, family relationships, child rearing, and education, the right of privacy is logically extended to include the abortion decision.¹¹

The rationale of the *Roe* Court, premised upon a substantive constitutional right by analogy, has been criticized as being inadequate and illogical¹² and as opening up the use of the ultimate holding to indiscriminate expansion or restriction.¹³ This prediction was fulfilled in *Doe* when the Massachusetts court lifted the *Roe* holding out of context and used it as a basis for denying relief to the prospective father. Although the *Doe* court made pro forma mention of the father's rights historically¹⁴ and as construed before *Roe v. Wade*,¹⁵

11. *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

12. *E.g.*, Tribe, *Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 3-7 (1973) [hereinafter cited as Tribe]; Vieira, *Roe and Doe: Substantive Due Process and the Right of Abortion*, 25 HASTINGS L.J. 867, 873, 877 (1974) [hereinafter cited as Vieira].

13. Vieira, *supra* note 12, at 877-78.

[I]nadequately reasoned opinions are characteristically as vulnerable as they are threatening. Precisely because such opinions have not been properly explained, they can either be greatly expanded or severely restricted in future cases. So it is with *Roe* and *Doe*. Those cases . . . add relatively little, other than the specific right of abortion, to what had been decided in *Griswold v. Connecticut*.

Id.

14. 314 N.E.2d at 131. In ancient Greece and Rome, if abortions were proscribed at all, it was on the basis of an intentional interference with the father's right to his offspring. *Roe v. Wade*, 410 U.S. 113, 130 (1973). At common law, abortions performed before "quickening" were allowed, without reference to the husband's consent. How relevant the common law is to a decision in 1974 is indeed questionable, particularly since many matters not prohibited at common law have since been regulated by statute. See note 15 *infra*; cf. Vieira, *supra* note 12, at 873-74 (citing narcotics traffic as an example of an activity permitted at common law but since regulated by statute).

15. 314 N.E.2d at 131. Under the earlier criminal statutes, the father's interests were adequately protected since abortion was legal only in the extraordinary circumstances of danger to the mother's life or health. *But see Herko v. Uviller*, 203 Misc. 108, 114 N.Y.S.2d 618 (Sup. Ct. 1952) (wife's consent to a legal abortion performed without her husband's consent held to preclude his recovery for loss of consortium and deprivation of his offspring). As these statutes were revised and liberalized, only one state provided for the consent of the husband before a woman could have an abortion. WASH. REV. CODE § 9.02.070 (1974). For an excellent review of the rights of the father as reflected in case law and statutes see Note, *Abortion: The Father's Rights*, 42 U. CIN. L. REV. 441 (1973) [hereinafter cited as *Father's Rights*].

In those states that did not expressly provide for spousal consent, many local hospitals included provisions for the husband's consent in their own regulations, no doubt strongly influenced by *Touriel v. Benveniste*, Civil No. 776,790 (Cal. Sup. Ct., Oct. 20, 1961). This case held that the wife's consent to an illegal abortion was no defense to the husband's suit for damages to his legally protected interest in his unborn child. While the court's motive

the predisposing factor in *Doe* was the Supreme Court's extension of the right of personal privacy to include a woman's decision to terminate her pregnancy. It was this holding, rather than the rationale used by the Court in *Roe v. Wade*, that bound the *Doe* court.¹⁶

The extent to which the constitutional right of privacy recognized in *Roe* is to be protected depends on the balancing of interests and, implicitly, on the scope of protection afforded.¹⁷ Just as the Court did not specify the source of the right of privacy,¹⁸ neither did it define its scope.¹⁹ *Griswold v. Connecticut*²⁰ reflected the Court's frequent emphasis on the importance of privacy in the *family* and the *marriage relation*;²¹ in contrast, *Roe v. Wade* secured *individual* privacy against unwarranted state interference.²² Certainly, both the family as a unit and the woman as an individual have a right of privacy against the state. But once the woman enters the marriage relation and her right is seen in the context of a family or quasi-family setting, should her individual right of privacy remain immune from state intercession on the father's behalf?²³ That the *Roe*

may have been to enhance the deterrent effect of the criminal statute, the father's articulated interests do not suddenly vanish once abortion is legalized. *But see Father's Rights, supra* at 445.

16. After the 1973 decisions, recognition of an enforceable right in the husband to prevent the abortion would raise serious constitutional questions. Although the court [sic] did not pass on the husband's right, it used language inconsistent with such a right.

... Some things must be left to private agreement.
314 N.E.2d at 132.

17. See Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?*, 64 MICH. L. REV. 197 (1965).

18. The Court stated:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

410 U.S. at 153. The Court obviously preferred to predicate the right of privacy on the due process clause of the fourteenth amendment, the approach taken by Justice Harlan in his concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965).

19. The Court went on to say: "the right of personal privacy includes the abortion decision, but . . . this right is not unqualified and must be considered against important state interests in regulation." 410 U.S. at 154.

20. 381 U.S. 479 (1965).

21. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967).

22. 410 U.S. at 163 (1973).

23. See *Father's Rights, supra* note 15, at 460. Since the contractual nature of marriage imposes certain rights and duties that would not otherwise exist, *Stanley v. Illinois*, 405 U.S.

Court left open the validity of spousal consent statutes²⁴ would seem to indicate the right may be restricted for reasons other than those which are defined as "compelling state interests."²⁵ While purporting not to decide this issue, stating "some things must be left to private agreement,"²⁶ the *Doe* court in fact decided it by limiting its analysis to the interests of the woman in relation to the state.

INTEREST IN PROCREATION

The majority in *Doe* reasoned that since the state cannot directly interfere with a woman's abortion decision, it cannot, through a private individual, effectuate the same result and enter a zone which the Supreme Court has determined to be distinctly private.²⁷ But a closer examination of family and tort law indicates that the state frequently enforces private rights on behalf of the individual—rights which the state on its own behalf could never enforce. Looking to both legal and philosophical sources, Justice Reardon, dissenting in *Doe*, described the rights of procreation and parenthood recognized by domestic, tort, and property law.²⁸ By focusing on the bare holding of *Roe*, the majority was able to ignore the relational interests underlying all these areas.

Each state has its own laws regulating marriage, annulment, and divorce.²⁹ It is generally accepted that annulment is granted where one of the parties misrepresents, at the time of the marriage, his or her intention to have children—reasoning that procreation is fundamental to marriage and such misrepresentation is similar to fraud in the marriage contract.³⁰ One state has granted divorce on the

645, 663 (1972) (Burger, C.J., dissenting), perhaps *Roe* is not so readily extended to the married individual.

It can be argued that when Ms. Doe married and engaged in sexual intercourse she waived her right of privacy. This argument is especially cogent when, as here, the pregnancy was desired by both the husband and the wife at the time of conception. 314 N.E.2d at 129. See Note, *Abortion: The Future Cases: Fathers' Rights*, 8 U. SAN FRAN. L. REV. 472, 482-85 (1973). But see *Jones v. Smith*, 278 So. 2d 339, 343 (Fla. Dist. Ct. App. 1973) (rejecting the idea of a single woman's waiver by the mere fact of her pregnancy).

24. See note 3 *supra*.

25. See note 9 *supra*.

26. 314 N.E.2d at 132. See note 16 *supra*.

27. 314 N.E.2d at 132.

28. *Id.* at 137 (noting the rights of the father in custody, adoption, wrongful death, and distribution of estates).

29. See, e.g., MASS. GEN. LAWS ANN. chs. 207-08 (1958).

30. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 111-12 (1968).

ground of "constructive desertion" when a spouse refused to have sexual intercourse without the use of contraception.³¹ Underlying judicial decisions to grant annulment or divorce is the notion of an implied contractual right of each spouse to have children.³² Because of statutes prohibiting adultery, and because the womb has yet to be supplanted by the test tube, the courts must tacitly recognize such an implied contract, or allow a woman to prevent her husband from ever having children.

It has been suggested that, like a spouse's refusal to conceive, the husband's refusal to consent to his wife's abortion be made evidentiary grounds for divorce.³³ This in fact was suggested as an alternative remedy by the court in *Doe*.³⁴ The inconsistency of the court's

Massachusetts permits annulment for fraudulent representations which go to the very essence of the marriage. MASS. GEN. LAWS ANN. ch. 207, § 14 (1958). No Massachusetts case has dealt with the issue of a refusal to bear children as grounds for annulment. Except where the marriage has not been consummated, the denial of sexual intercourse is not grounds for annulment. *Sasserno v. Sasserno*, 240 Mass. 583, 134 N.E. 239 (1922).

31. *Kreyling v. Kreyling*, 20 N.J. Misc. 52, 23 A.2d 800 (Ch. 1942). *Contra Harrington v. Harrington*, 38 Del. 333, 192 A. 555 (Super. Ct. 1937), where the court did not accept the idea of constructive desertion: "[S]exual intercourse, and the consequent propagation of children, is not the sole duty incident to the marriage contract." *Id.* at 338-39, 192 A. at 557.

In spite of a judicial tendency to view children as essential to the marriage, sterility, unless known and undisclosed at the time of marriage, is not grounds for divorce in most states. Nor would a sterilization furnish grounds for divorce unless it could be shown the operation was sought pursuant to an undisclosed pre-marital plan. Note, *Elective Sterilization*, 113 U. PA. L. REV. 415, 438-39 (1965). See *Murray v. VanDevander*, 522 P.2d 302 (Okla. Ct. App. 1974):

We have found no authority . . . which holds that the husband has a right to a child-bearing wife as an incident to their marriage. . . . We find that the right of a person who is capable of competent consent to control his own body is paramount.

Id. at 304. Compare *Pratt v. Davis*, 224 Ill. 300, 79 N.E. 562 (1906), where a physician was held liable for sterilizing an incompetent woman without her husband's consent. Because she was of unsound mind and incapable of consenting, his consent was required for the sterilization. This type of analysis, premised on an implied contractual right to have children, was not considered by the *Doe* court except in the most cursory fashion. See note 34 *infra*.

32. Note, *Willful Refusal to Have or Bear Children as Grounds for Divorce or Annulment*, 55 YALE L.J. 596, 596-97 (1946).

33. FAMILY LAW Comment, *supra* note 9, at 325.

34. 314 N.E.2d at 133. The court merely posits this as an option available to the husband, but does not explain on what statutory grounds a divorce could be granted. Massachusetts has never entertained constructive desertion as grounds for divorce; only physical desertion for a one year period is recognized. MASS. GEN. LAWS ANN. ch. 208, § 1 (Supp. 1975). If divorce were granted in such a situation, it would be based not on fraud in the marriage contract, but rather on breach of that contract. See *Kreyling v. Kreyling*, 20 N.J. Misc. 52, 23 A.2d 800 (Ch. 1942); note 31 *supra* and accompanying text. If divorce is a possibility stemming from an unconsented-to abortion, this could provide compelling grounds for hospitals and doctors to enact spousal consent provisions—in effect viewing both the husband and wife as patients. See 314 N.E.2d at 137 (Reardon, J., dissenting); cf. Note, *Elective Sterilization*, 113

reasoning should be clear. On the one hand, the court flatly denied the existence of *any* legal rights in the husband while, on the other, it hinted that procuring an abortion without the husband's consent could be potential grounds for divorce or separation. Apart from the inconsistency of the court's analysis, there is a real question of the adequacy of the suggested relief to protect the father's interest in the child. Divorce would only serve to leave the husband free to remarry a more "family-minded woman."³⁵

RELATIONAL INTEREST

The topics that have been addressed illustrate the implied contractual right of the husband in procreation that is breached by the abortion. Abortion has the further effect of foreclosing the object of procreation, *i.e.*, the parent-child relationship.³⁶ This relational interest is emphasized in the areas of custody and adoption and in some states is protected by an action similar to consortium.³⁷ Those rights which are recognized in the case of interference with an already-existing relation would seem to extend to the situation of abortion which completely deprives the father of such a relation. The law imposes upon the father the duty of support not only once the child is born³⁸ but for the period during which the child is *in utero*.³⁹ To offset this duty, the law defends the father's interest in

U. PA. L. REV. 415, 438-39 (1965) (suggesting that for purposes of sterilization, husband and wife should both be viewed as patients). *But cf.* O'Beirne v. Superior Court, 1 Civil No. 25,174 (Cal. Sup. Ct. Dec. 6, 1967) (because abortion is a medical rather than a legal issue, only the wife's consent is necessary).

35. FAMILY LAW COMMENT, *supra* note 9, at 322.

36. See generally Foster, *Relational Interests of the Family*, 1962 U. ILL. L.F. 493.

37. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 124, at 883 (4th ed. 1971); see Daily v. Parker, 152 F.2d 174 (7th Cir. 1945) (minor child has a cause of action against a third party for alienation of his father's affections). Massachusetts has declined to extend consortium to the parent-child relationship because of the possibility of fraudulent suits and the difficulty of determining damages. Nelson v. Richwagen, 326 Mass. 485, 487, 95 N.E.2d 545, 546 (1950).

38. MASS. GEN. LAWS ANN. ch. 273, § 1 (Supp. 1975), imposes criminal penalties when a husband or father unreasonably neglects or refuses to support his wife and minor child. See also Gomez v. Perez, 409 U.S. 535 (1973) (illegitimate children held entitled to support from their natural fathers under the equal protection clause). It has even been suggested that, due to the trend away from bastardization, a child who is the product of artificial insemination by a third-party donor (AID child) should be held legitimate for purposes of support, in spite of the lack of the husband's consent to the procedure. 23 BUFF. L. REV. 548, 561 (1974). Not only is the father responsible for supporting the child if born, he will most likely be responsible for the expense of an abortion, either directly or indirectly through his insurance payments.

39. People v. Yates, 114 Cal. App. 782, 786, 298 P. 961, 963 (1931). *But see* Burns v. Alcala,

adoption and custody proceedings which, like abortion, terminate his parental rights.⁴⁰ The same protections given in adoption and custody proceedings—the consent requirement and the right to a hearing—could readily be extended to the abortion decision.

Another example of a relational interest arguably still recognized after *Roe v. Wade* is recovery for wrongful death caused by prenatal injuries.⁴¹ The woman's consent to the abortion would be an effective defense for the physician if the woman sues him for wrongful death, but it is not clear if her consent would preclude the non-consenting father's recovery. The possibility of recovery by the father rests on the unborn child's status as a "person" within the meaning of the state's wrongful death statute.⁴² In Massachusetts it has been held that a non-viable fetus must be born alive in order to gain the status of personage.⁴³ Depending on the method used to abort and the lifesaving measures taken, the child in *Doe* could have been born alive and survived, if only for a few hours, with the aid of respirators.⁴⁴

If there is a possibility that the husband could recover for the wrongful death of his offspring in such a case, should he not be entitled to a hearing to determine the bona fides of his refusal to consent, to enjoin the abortion and thus make a wrongful death suit unnecessary?⁴⁵ *Doe* has produced the anomalous situation of grant-

43 U.S.L.W. 4374 (8th Cir. Mar. 18, 1975) (unborn child not a "dependent" within the meaning of the Social Security Act entitling an expectant mother to AFDC payments).

40. See *Stanley v. Illinois*, 405 U.S. 645 (1972) (putative father entitled to a hearing as to parental fitness before his child can be taken away from him).

41. But see *Father's Rights*, *supra* note 15, at 465, suggesting that the *Roe* Court's recognition of a compelling state interest only at the third trimester of pregnancy will preclude fathers from maintaining a wrongful death action for the abortion of a pre-viable fetus.

42. Although a fetus is not a "person" for purposes of criminal law, it can be a person within the meaning of civil statutes. *State v. Dickinson*, 28 Ohio St. 2d 65, 70, 275 N.E.2d 599, 602 (1971).

43. *Leccese v. McDonough*, 279 N.E.2d 339, 341 (Mass. 1972). In *Torigian v. Watertown News Co.*, 352 Mass. 446, 225 N.E.2d 926 (1967), an auto accident caused the premature birth of a non-viable three and one-half month old fetus. Intestate, who lived two and one-half hours after birth, was held to have been a "person" within the meaning of the Massachusetts Wrongful Death Statute, MASS. GEN. LAWS ANN. ch. 229, § 1 (Supp. 1975). Although the same question has not been addressed in the case of a viable fetus, 13 J. FAMILY L. 99, 111 (1974), it would seem that the same result would be reached.

44. This defendant was approximately eighteen weeks pregnant; allowing for the usual error in estimations of this sort, she could have been in her twentieth week. See *OBSTETRICS AND GYNECOLOGY ANNUAL*: 1973, at 167-72 (R. Wynn ed. 1973).

45. It is suggested that, just as the state's interest in potential life becomes more compelling as the third trimester approaches, see note 9 *supra*, so does that of the potential father.

ing the woman's physician substantive rights superior to those of the father.⁴⁶ Yet, as was seen above, the father still retains the duty to support the child⁴⁷ and the possibility of bringing a wrongful death action against the physician if an abortion is performed without his consent.

RECENT CASES

Case law relied on by the *Doe* court involved constitutional challenges to state spousal consent statutes; the suggestion seems to be that if spousal consent statutes could not be enforced, neither could injunctive relief be granted in *Doe*. A close look at this case law indicates the invalidity of spousal consent statutes is not nearly as settled an issue as the court intimates.

*Jones v. Smith*⁴⁸ merely held the plaintiff, as putative father, was not within the purview of the spousal consent provision⁴⁹ and denied the requested relief. It nowhere ruled the consent requirement unconstitutional—indeed, it indicated any spousal consent requirement should be extended to include putative fathers as well.⁵⁰ The statute in *Coe v. Gerstein*⁵¹ was found too broad in allowing the husband to refuse consent arbitrarily.⁵² The court indicated, however, that a statute protecting the father's individual interests, if not arbitrary and if uninfluenced by the state's interest in protecting maternal health and potential life,⁵³ would fall outside *Roe v. Wade* and would withstand constitutional attack.⁵⁴

46. During the first trimester the woman and her physician are the principal parties involved in determining whether an abortion should be performed. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

47. But see *Jones v. Smith*, 278 So. 2d 339, 343-44 (Fla. Dist. Ct. App. 1973) (mere support requirement not sufficient to establish a right in the father to prevent an otherwise legitimate abortion).

48. 278 So. 2d 339 (Fla. Dist. Ct. App. 1973), cert. denied, 415 U.S. 958 (1974).

49. FLA. STAT. ANN. § 458.22(3) (1973).

50. The court stated:

Although legislative enactments are presumed to be valid and the requirement for the consent of a "husband" is constitutional whatever may be contended with respect to the invalidity of a distinction between "husband" or putative father, such contention would simply be immaterial.

278 So. 2d at 342 n.3.

51. 376 F. Supp. 695 (S.D. Fla. 1973), cert. denied, 417 U.S. 279 (1974).

52. FLA. STAT. ANN. § 458.22(3) (1973) requires the written consent of the husband and the wife before a pregnancy can be terminated. Only if he is "voluntarily living apart from the wife" or if there is a life-threatening emergency is the husband's consent not required.

53. See note 9 *supra*.

54. 376 F. Supp. at 697; *Pound v. Pound*, 42 U.S.L.W. 2456 (Ill. Cir. Ct. Jan. 31, 1974)

The effect of a spousal consent statute (and by analogy, injunctive relief) would be to lessen the woman's control over her own body. But if the father is willing to assume custody and support, and if the conception had been a desired one, perhaps requiring a full-term pregnancy is justified. Of course, it would have to be shown the father's consent was not withheld arbitrarily or capriciously. These are formidable obstacles but not sufficient to totally ignore the father's rights in the abortion decision.⁵⁵

INJUNCTIVE RELIEF

It is a basic rule of equity that injunctive relief is given only where relief at law is inadequate and only where enforcement of the injunction is feasible.⁵⁶ The "inadequacy" requirement was satisfied in *Doe*, since it can hardly be said that giving grounds for divorce is an adequate substitute for loss of a child. Enforcement was feasible since there was no indication that the mother would have intentionally disregarded an injunction.⁵⁷ Enforcement, however, could become a practical problem—the court might have to face the complication of accidental or spontaneous abortion.⁵⁸ Could the mother be cited for contempt in such a case?

The injunction sought here would operate in all respects as a decree for specific performance, since enjoining the wife from breaching the provisions of the implied contract to bear a child is an indirect means of enforcing those provisions.⁵⁹ The bases underlying refusal to specifically enforce personal service contracts—the impracticality of judicial supervision, the thirteenth amendment's ban on involuntary servitude, and the adverse effects of compulsion

(any restriction on the abortion decision is a legislative matter). *But see* Tribe, *supra* note 12, at 42 n.182 (suggesting that the interest of those seeking restrictions on abortion is in preserving potential life rather than in protecting the rights of the father).

55. *Cf. Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972) (although speed and efficiency are to be encouraged, such considerations should not supersede recognized constitutional rights).

56. 314 N.E.2d at 134 (Hennessey, J., dissenting in part).

57. *Id.* at 135 (Reardon, J., dissenting).

58. Spontaneous abortions may be brought on by conscious or unconscious psychological factors, such as the burden of having to carry an unwanted pregnancy to term. Pholman, *Unwanted Conceptions: Research on Undesirable Consequences*, 14 *EUGENICS Q.* 143, 144 (1967).

59. *See Van Name v. Federal Deposit Ins. Corp.*, 130 N.J. Eq. 433, 443, 23 A.2d 261, 267 (1941).

in a relation requiring mutual respect and cooperation⁶⁰—apply with equal force to the situation in *Doe*.

Conceding the problems inherent in granting injunctive relief in this case, the court was not precluded from granting the less drastic alternative of a declaratory judgment.⁶¹ Granting declaratory relief might not fulfill this plaintiff's demands (since the wife could not be cited for contempt),⁶² but it would give guidance to the legislature in any attempt to enact a spousal consent statute and to hospitals wishing to regulate abortions.⁶³ Rather than discuss the appropriateness of a declaratory judgment, the court seemed to have overlooked it as a viable alternative in the face of its inability to grant injunctive relief.

CONCLUSION

The *Doe* court discussed neither the inferences to be drawn from the legislature's silence, nor the propriety of judicial, rather than legislative, determination of the father's rights. In its decision to deny the relief requested, the court may have been influenced by the failure of the Massachusetts legislature to follow other state legislatures⁶⁴ which had enacted spousal consent statutes protecting the father's interest. This silence could understandably be interpreted in two ways: The legislature intended that no affirmative action be taken on the husband's behalf;⁶⁵ or the legislature felt the Supreme Court's ruling in *Roe v. Wade* was so pervasive that it precluded any competing interest from being recognized.⁶⁶ Abortion is a subject

60. Van Hecke, *Changing Emphases in Specific Performance*, 40 N. CAR. L. REV. 1, 16-20 (1961). But see N.Y. Times, Jan. 29, 1972, § 1, at 4, col. 3 (decision by the Ontario Supreme Court enjoining a woman in her sixteenth week of pregnancy from having a therapeutic abortion).

61. See *Columbia Pictures Corp. v. De Toth*, 26 Cal. 2d 753, 760, 161 P.2d 217, 221 (1945). Declaratory judgments are statutory in origin and may be granted regardless of the possibility of injunctive relief. MASS. GEN. LAWS ANN. ch. 231A, § 1 (1959). It is characterized here as a less drastic remedy since disregard of the judgment by the defendant would only be "inappropriate," not contempt. *Steffel v. Thompson*, 415 U.S. 452, 471 (1974), citing *Perez v. Ledesma*, 401 U.S. 82, 124-26 (1971) (separate opinion of Brennan, J.).

62. See note 61 *supra*.

63. 314 N.E.2d at 130. Declaratory relief would also seem to be the most effective means of assuring that the woman is fully aware of the impact of her decision on the marriage relation.

64. For a listing of those states which enacted consent statutes following *Roe v. Wade* see FAMILY LAW COMMENT, *supra* note 9, at 312-13 n.9.

65. Cf. *Leisy v. Hardin*, 135 U.S. 100, 109 (1890).

66. Cf. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 318-19 (1851).

fraught with moral, ethical, and religious overtones, none of which was adequately considered by the Supreme Court in *Roe v. Wade*.⁶⁷ *Doe* perpetuated this trend, as the court focused on the mother's right of privacy to the exclusion of the heretofore unarticulated interest of the father.

The purpose of this discussion has not been to dispute the holding of *Doe v. Doe* but rather to point out some considerations the court overlooked in its desire to be consistent with *Roe v. Wade*. Clearly, the impracticality of enforcing an injunction was a major consideration in the court's refusal to grant relief. In denying the injunction, the court recognized the practical difficulties and deliterious effects of such an order. In refusing to grant declaratory relief, however, the court left future fathers with no enforceable rights against the mother. Furthermore, the court has placed the added burden on the legislature of rebutting the presumption of unconstitutionality of future spousal consent statutes.⁶⁸

The *Doe* court has added considerably to the impact of *Roe v. Wade* through its extreme emphasis on individual choice and right of privacy. The Supreme Court has indicated that a state cannot interfere with a woman's decision to terminate her pregnancy—but is her individual right so absolute as to abrogate the rights of the husband and father? After *Doe*, one wonders just how far the court is willing to go in its quest for maximizing individual choice, a quest which presently appears to ignore much of our domestic and tort law. It is suggested here that rights other than those of the mother are involved in the abortion decision, rights which must be reckoned with, particularly since *Roe v. Wade*. An open balancing of all interests by the court would have provided more concrete guidance for hospitals, the legislature, and the judiciary.

Judith Haskell Zernich

67. Tribe, *supra* note 12, at 51-52.

68. 314 N.E.2d at 134 (Hennessey, J., dissenting in part).